CADDNAR

EXHIBIT A

***Skilbred, et al. v. Ward, et al.*, 13 CADDNAR 125 (2013)**

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ORDER ON PETITIONERS' MOTION FOR SUMMARY JUDGMENT ENTERED AUGUST 29, 2013

The evidence presented establishes that summary judgment should be granted in favor of the Applicant Respondents and the Department and against the Petitioners on all matters at issue except:

- Issues of "the management of watercraft operations under IC. 14-15";

- "The interests of a landowner having property rights abutting the public freshwater lake or rights to access the public freshwater lake" as specified at Indiana Code § 14-26-2-23(4 & 5); and

- Issues associated with the ownership of Lot 75 of Long Lake Park.

HISTORICAL BACKGROUND

1. The Petitioners who initiated the instant proceeding also initiated three other proceedings based upon the same or substantially the same legal theories, which sought administrative review of three other permits approved by the Department. For this reason, the instant order is nearly identical in some respects to the nonfinal orders issued in those proceedings. *See Skilbred et al. v. Spaw, et al*., Administrative Cause No. 11-160W; *Skilbred et al. v. Lorntz, et. al.*, Administrative Cause No. 11-161W and *Skilbred, et al. v. Macklin, et al.*, Administrative Cause No. 11-162W.

2. Many, if not all, of the parties to the instant proceeding have previously been involved in multiple adjudicatory proceedings the decisions in which have a direct bearing upon this proceeding. It is believed that a brief summary of two of those proceedings will provide a degree of perspective useful to understanding the discussion that follows.

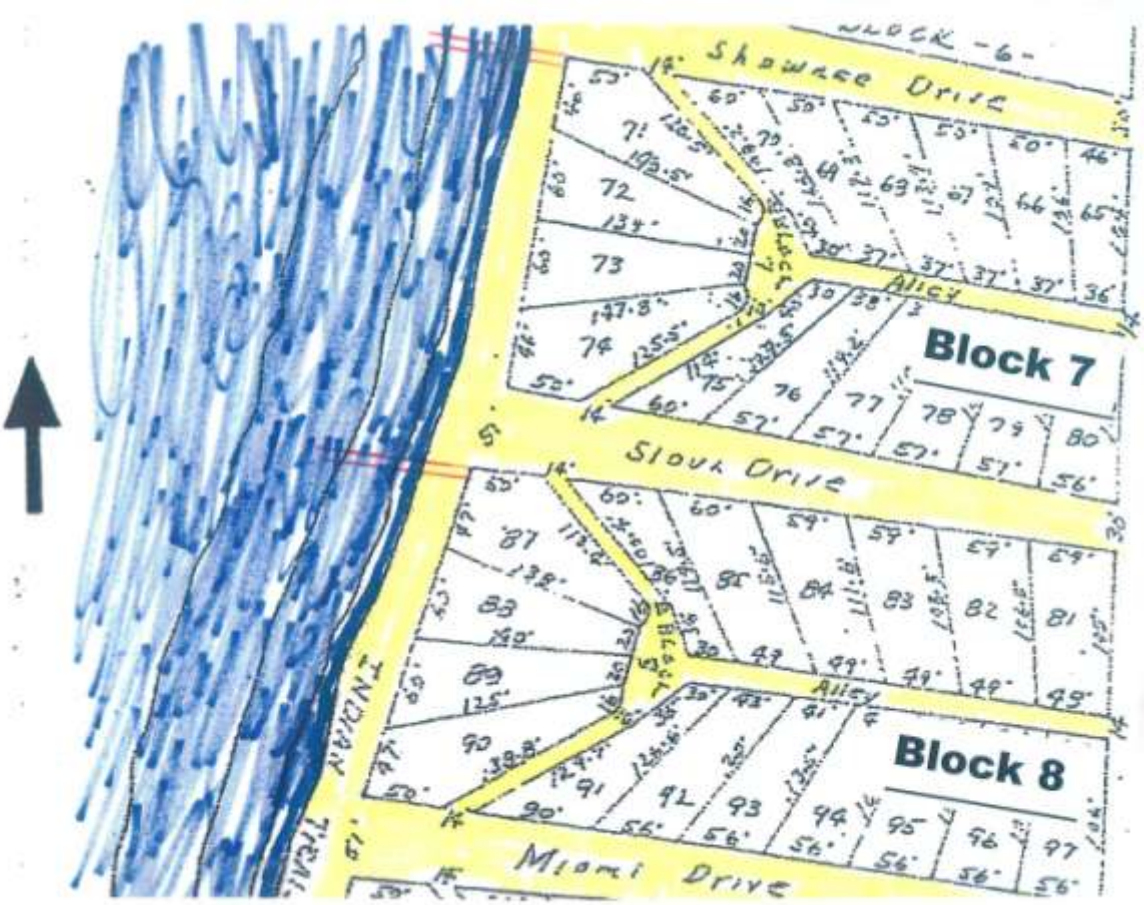
3. The first such proceeding was decided by the Commission on July 28, 2010. *Spaw v. Ashley, 12 CADDNAR 233, (2010)*. Petitioners' Motion for Summary Judgment, Exhibit 9. The second was decided by the LaGrange County Circuit Court on May 6, 2011. *Altevogt, et al. v. Brand, et al.*, Cause No. 44C01-0811-MI-066. Petitioners' Motion for Summary Judgment, Exhibit 11.

4. The Commission's final order in *Spaw* was affirmed on Judicial Review by the Allen County Circuit Court in an order entered on July 8, 2011, *Ashley, et al. v. Spaw, et al.*, Cause No. 02C01-1008-MI-1178, and was subsequently affirmed by the Indiana Court of Appeals in a Memorandum Decision dated April 17, 2012. *Ashley, et al. v. Spaw, et al.*, Cause No. 02A03-1108-MI-340.

5. The *Altevogt* decision was affirmed by the Indiana Court of Appeals. *Altevogt v. Brand,* 963 N.E.2d 1146, (Ind. App. 2012).

6. None of the parties sought transfer to the Indiana Supreme Court with respect to either the *Spaw* or *Altevogt* decisions.

7. Both the *Spaw* decision and the *Altevogt* decisions discuss certain grants and restrictions associated with the plat of Long Lake Park, one of which is a provision in the plat "that all drives, alleys, and walks are for the use of the owners of lots and their guests…" *Spaw at 239*. In *Spaw* it was determined that the "drives, alleys and walks", with respect to Block 7 and Block 8 of Long Lake Park, including Shawnee Drive, Sioux Drive, Miami Drive, a three-pronged alley existing within both Block 7 and Block 8, as well as Indian Trail, were available for use by any Lot owner within Long Lake Park. The drives, alleys and walks were generally depicted in yellow on the following diagram.



Spaw at 245.

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8. In *Altevogt*, the Plaintiffs, some of whom are Petitioners here, requested the LaGrange County Circuit Court to determine that by dedication, adverse possession or otherwise that as relevant here the owners of Lots 71 through 74 in Block 7, which Lots abut Indian Trail, actually own the portions of the Indian Trail immediately adjacent to their Lots.

9. In denying the Plaintiffs' Petition, the trial court stated that the facts "establish that Plaintiffs cannot prove any of the elements of CONTROL, INTENT, or NOTICE by clear and convincing evidence, even though to prevail Plaintiffs must prove not one, but all of these elements." *LaGrange Circuit Court Order* at pg. 17.

10. In *Altevogt*, the trial court concluded, "it was the intent of the Developer, Lee J. Hartzell, as expressed in the plat and restrictions, that all lot owners in the Plat of Long Lake Park to be co-tenants as to all drives, alleys and walkways, **including the Indian Trail**. *Id*. at pg. 20 (emphasis added). The Court of Appeals further

clarified that the LaGrange Circuit Court's reference to the Lot owners as "co-tenants as to all drives, alleys and walkways, including the Indian Trail" did not mean "title to the Indian Trail has been quieted in all lot owners as co-tenants." Instead the Court of Appeals concluded: "what is clear is that all lot owners have an easement to use the Indian Trail, regardless of the fee owner, and that the [Petitioners] have not established title by adverse possession." *Altevogt v. Brand*, 963 N.E.2d 1146, 1155, (Ind. App. 2012).

11. The trial court in *Altevogt* determined that issues pertaining to the Long Lake Park Lot owners' riparian rights fall squarely within the sole jurisdiction of the Commission, LaGrange Circuit Court Order at pg. 18, and these issues are fully developed and decided in *Spaw*.

12. The riparian rights of the Lot owners within Long Lake Park are established by a separate and distinct grant contained within the plat which reads, "'Each lot owner shall be entitled to an easement on the Lake Shore six feet in width for a boat landing which easement shall be in front of the block in which the lot is located and the easement shall bear the same number as the lot it is for and the easements shall be numbered consecutively from North to South.' Plat Book 1, page 118, attached as Exhibit 'A' to Affidavit of Sharon Shiltz, LaGrange County Recorder (September 23, 2009) and included with 'Claimants' Motion for Summary Judgment' (Filed September 25, 2009)." *Spaw* at 238.

13. The Commission determined as follows:

> 66. Each lot owner was entitled to an easement. No distinction was made in the easement among lot owners contingent upon their proximity to Big Long Lake.
> 67. Property decisions based upon this conveyance must properly treat all lot owners in an equivalent manner, but each lot owner was entitled to a geographically unique easement.
> 68. The easements traversed Indian Trail and extended to the lakeshore of Big Long Lake.
> 69. Through the easement described in Finding 41, Hartzell conveyed riparian rights to the lot owners as the dominant tenants.
> 70. The easement for each lot owner was six feet wide. The entitlement was on a lot specific basis. If a person owned more than one lot, the person received more than one easement. A person who owned 1½ lot was effectively entitled to an easement nine feet wide, if the lot and the one-half-lot were contiguous. A person who owned two contiguous lots was effectively entitled to an easement twelve feet wide. A person who owned three lots was entitled to an easement 18 feet wide and so on.
> 71. The purpose of the easement was for a "boat landing".
> …
> 81. The "boat landing" referenced by the easement described in Finding 41 was an unimproved or improved place from which boats may be used to deliver passengers or goods. Specifically prohibited was the placement of a boathouse.

> Examples of improvements that could be made by a lot owner included the placement of a pier or wharf.

Spaw at 241 & 243.

14. The "boat landings" (herein referred to as "riparian easements") are located within the Block in which the Lot is located numbered consecutively, by Lot number, from the northern most point of the Block, which for Block 7 is essentially the south boundary of Shawnee Drive and for Block 8 is the southern boundary of Sioux Drive. *Spaw* at 245.

15. The final order of the Commission stated:

> Each Lot owner in Block 6, Block 7, and Block 8 has a geographically unique easement on the shoreline or water line of Big Long Lake that is six feet wide. Subject to the regulatory authority of the Department of Natural Resources under IC 14-26-2 and 312 IAC 11-1 through 312 IAC 11-5, the easement may be used for a boat landing, including the placement of a temporary pier. The easement is in front of the Block in which the Lot is located. Each individual easement shall bear the same number as the Lot it is for and shall be numbered consecutively from north to south.

Spaw at 233.

PROCEDURAL BACKGROUND AND JURISDICTIONAL DETERMINATION

16. At issue in the instant proceeding is one permit identified as PL-21897 ("PL-21897") issued to Lot owners within Long Lake Park for the construction of a pier extending into Big Long Lake from riparian zones resulting from the Lot owners' combining of their individual six foot riparian easements as determined in *Spaw*.

17. Permit PL-21897, which was issued by the Department of Natural Resources ("Department"), authorizes the construction of a pier under specified conditions "in front of two adjoining lot owners' deeded easements for Lots 75 through 79 owned by Gary and Nadine Ward and Carole Ensley that combine for a total of 30' of shoreline." Petitioners' Motion for Summary Judgment, Exhibit 5.

18. The Respondents to this proceeding who are the holders of PL-21897 will be referred to collectively as "Applicant Respondents".

19. On January 9, 2012, the Petitioners, Lawrence J. Skilbred, Patricia L. Skilbred, James A. Williams, Patricia A. Williams, John D. Gross, Lynn E. Fisher and Betty J. Fisher as Trustees of the Revocable Living Trust of Lynn E. Fisher & Betty J. Fisher dated July 2, 2008, Michael M. Ashley, Lana S. Ashley, Lloyd A. Bickel, Karen A. Bickel, Carl Ray Mosser, Margaret M. Mosser, Phillip E. Lake, Karen M. Lake, Debra Ann Cozmas Parkinson, Page D. Liggett as Trustee of The Page and Carole Liggett 2005 Trust dated November 1, 2005, Roger N, Meyer, Beverly A. Meyer, Long View Financial, LLC, Thomas A. Hare, III, Regina K. Hare, James R. Morris and Mary Jane Johnson, (referred to collectively as "the Petitioners"), by counsel Barrett & McNagny LLP, filed the above

captioned proceeding for the administrative review of the Department's approval of PL-21897.

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20. Big Long Lake is a public freshwater lake. Indiana Code § 14-26-2-3, *Spaw v. Ashley*, 12 CADDNAR 233 (2010).

21. The Department is the administrative agency responsible for the administration of Indiana Code § 14-26-2, commonly referred to as the Lake Preservation Act, and 312 IAC 11-1 through 312 IAC 11-5 adopted for the purpose of implementation of the Lake Preservation Act under which PL-21897 purports to be issued.

22. Procedurally, Indiana Code §§ 4-21.5-3, commonly referred to as the Administrative Orders and Procedures Act, or AOPA, and 312 IAC 3 adopted for purpose of implementing AOPA will govern this proceeding.

23. The Commission is the ultimate authority for proceedings involving the Lake Preservation Act. Indiana Code § 14-10-2-3 and 312 IAC 3-1-2.

24. A telephone prehearing conference was conducted on February 10, 2012 with notice of the same being served upon each of the Respondents. The Petitioners and Respondent, Department, appeared by counsel. Applicant Respondents appeared *pro se*.

25. During the prehearing conference a schedule for filing and responding to motions for summary judgment was established. The Petitioners filed a timely motion for summary judgment. The Respondents filed no response to the Petitioners' motion.

26. Oral argument on the Petitioners' motion for summary judgment occurred on August 22, 2012 by which time, Applicant Respondents, Gary Ward and Nadene Ward, were represented by counsel, Jason M. Kuchmay. Counsel, Patrick G. Murphy, presented argument on behalf of the Petitioners and counsel, Eric L. Wyndham, presented the Department's argument.

27. The Commission is possessed of jurisdiction over the subject matter and the persons of the parties involved in the instant proceedings.

SUMMARY JUDGMENT STANDARD

28. Under AOPA, summary judgment motions shall be considered in the same manner as a court that is considering a motion filed under Trial Rule 56 of the Indiana Rules of Trial Procedure. Indiana Code § 4-21.5-3-23

29. "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages

alone although there is a genuine issue as to damages or liability as the case may be." Indiana Rules of Trial Procedure, Trial Rule 56(C).

30. "A fact is 'material' for summary judgment purposes if it helps to prove or disprove an essential element of the plaintiff's cause of action. A factual issue is 'genuine' for purposes of summary judgment if the trier of fact is required to resolve an opposing party's different versions of the underlying facts." *Rosheck v. Mader Dental*, 12 CADDNAR 251 (2010), internal citations omitted.

31. "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Wells v. Hickman*, 657 N.E.2d 172, 175, (Ind. App. 1995).

32. "A party or parties moving for summary judgment have the burden of proof with respect to summary judgment, regardless of whether it or they would have the burden in an evidentiary hearing." *Save Our Rivers, et al. v. Guenther, Ford & DNR*, 10 CADDNAR 213 (2006) citing *Regina Bieda v. B & R Development and DNR*, 9 CADDNAR 1 (2001).

33. "Any doubt as to the existence of an issue of material fact, or an inference to be drawn from the facts, must be resolved in favor of the nonmoving party." *Musgrave v. Squaw Creek Coal Co. and DNR*, 12 CADDNAR 192, 197, (2009), citing *Travelers Indem. Co. of America v. Jarrells*, 906 N.E.2d 912, 915 (Ind. Ct. App. 2009).

34. "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." Indiana Rules of Trial Procedure, Trial Rule 56(B).

35. "Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court." Indiana Rules of Trial Procedure, Trial Rule 56(C).

36. If a judgment is not rendered upon the entirety of the case, the administrative law judge shall "make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." Trial Rule 56(D).

<u>AGGREGATING RIPARIAN EASEMENTS</u>

37. The six foot riparian easements owned by each individual Lot owner are "appurtenant easements" distinct from the common easement granted to all Lot owners with respect to Indian Trail. *Spaw* at 246, LaGrange Circuit Court, Cause No. 44C01-0811-MI-066.

38. The Petitioners maintain that each Lot owner's individual appurtenant riparian easement "can be utilized only for the benefit of the specific lot to which it is appurtenant, and for the benefit of no other lot." On this premise, the Petitioners conclude that the Department's issuance of PL-21897, which authorizes the aggregation of the Applicant Respondents' riparian easements, is contrary to law. See Petition for Administrative Review and Stay of Effectiveness, filed on January 9, 2012.

39. The Petitioners hinge their challenge to PL-21897 and the combining of the Applicant Respondents' riparian easements upon common law relating to appurtenant easements. The Petitioners fail to consider the ramifications of the Indiana General Assembly's enactment of the Lake Preservation Act upon the application of common law relating to appurtenant easements that convey riparian rights.

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The AOPA Committee's Striking of Language from the *Spaw* Nonfinal Order:

40. The Petitioners initially find support for their position in the fact that the Commission's AOPA Committee, in considering objections to the administrative law judge's nonfinal order in *Spaw*, struck the following from the administrative law judge's Nonfinal Order:

> Paragraph (5) The identification of riparian zones attributable to particular Lots does not preclude a person who owns adjacent Lots from treating them as a single riparian zone for purposes of a boat landing and pier placement. A person with adjacent Lots may use the two six-foot-wide boat landing attributable to those Lots, and the resulting riparian zones, as a single riparian zone that is twelve feet wide. Also, two persons who own adjacent Lots may agree to combine their six-foot-wide boat landings into a single riparian zone that is twelve-feet wide. Three persons who own adjacent Lots may agree to use their six-foot-wide boat landings as a single riparian zone that is 18-feet wide and so on.

Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 15. (emphasis omitted)

41. In this proceeding the Petitioners expressly concur with the Applicant Respondents in the position that the striking of Paragraph 5 did not serve as a prohibition on the combining of riparian easements. However, the petitioners argue that the Commission had no purpose in prohibiting the combining of riparian easements because the Commission determined the riparian easements to be appurtenant easements, which by application of common law could not be combined as the Applicant Respondents and the Department have done.

42. It is clear that the Commission's striking of Paragraph 5 of the Nonfinal Order did not expressly prohibit the aggregation of the riparian easements and it is the determination here that the Commission did not intent to create an inference or endorse the application of common law in such a manner as to prohibit the combining of those riparian easements. Support for this conclusion is found in the Commission's AOPA Committee's discussion where the Committee members concluded that "the Paragraph 5 and Paragraph 6 issues are

not ripe for our determination." Petitioners' Motion for Summary Judgment, Exhibit 10, pg. 56 (emphasis added).

43. That the matter was not ripe for inclusion in the *Spaw* Final Order means simply that and nothing more.

Identifying the Real Property from which the Riparian Easements Originate:

44. Primary to the continued evaluation of the dispute presented, it is imperative that the servient estate associated with the riparian easements be identified and defined. Riparian rights flow from a "physical relationship of a body of water to the abutting land" *Meyers Subdivision POA v. DNR and Kranz*, 12 CADDNAR 282, 283, (2011). With respect to Big Long Lake, which is a public freshwater lake as defined at Indiana Code § 14-26-2-3, riparian rights may result from actual ownership of land abutting a shoreline or from "owner[ship] of an interest in land sufficient to establish the same legal standing as the owner of land, bound by a lake." 312 IAC 11-2-19.

45. At this juncture it is important to emphasize that Indian Trail "exists **between the shoreline or water line of Big Long Lake** and the entire lengths of Block 6, Block 7, and Block 8." *Spaw* at 239, and "**border[s]** the shoreline of Big Long Lake", *Spaw* at 248. In contrast, the language of the Plat of Long Lake Park states that "[e]ach lot owner shall be entitled to an easement **on the Lake Shore** six feet in width for a boat landing." *Spaw* at 238.

46. The importance of this distinction is that Indian Trail, and the co-tenancy of the dominant estate existing amongst all Lot owners within Long Lake Park in association with Indian Trail, ceases on the landward side of the shoreline of Big Long Lake.

47. The Petitioners' statement that the riparian easements "[emanate] from the Indian Trail within Long Lake Park…" is incorrect. Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 3.

48. Instead, each appurtenant riparian easement begins, and exists, solely upon a linear strip of property located **on** the shoreline of Big Long Lake.

49. The "shoreline or water line" of Big Long Lake is established by IC 14-26-2-4(1) at 956.21 feet, mean sea level. *Spaw* at 234, see also "Orders Regarding Legal Elevation of Big Long Lake and Regarding Motion to Withdraw Appearance on Behalf of Jennifer H. Miller and Zachary A. Miller" (September 16, 2009)".

50. It is the shoreline of Big Long Lake from which the riparian easements find their source.

Identifying the Owner(s) of the Servient Estate Associated with the Riparian Easements:

51. A second crucial determination, which was also discussed in *Spaw*, is the identification of the owner of the servient estate associated with the riparian easements.

52. "Lee J. Hartzell ("Hartzell") was a riparian owner along Big Long Lake in LaGrange County, Indiana. On June 12, 1923, Hartzell caused recordation with the LaGrange County Recorder of a plat for Long Lake Park." *Spaw at 238*. By virtue of his creation of the plat for Long Lake Park and his grant of the riparian easements to each of the individual Lot owners, Hartzell "was the servient tenant and continued to be the riparian owner." *Spaw* at 240.

53. Though there was never a specific transfer of Hartzell's interest in the servient estate and no specific disposition of his interest in Long Lake Park was provided for by Hartzell, upon Hartzell's death, through the execution of the "Last Will and Testament of Lee J. Hartzell" he gave, granted and bequeathed "all the rest and residue" of his estate to the Indiana Masonic Home. Consequently, the Indiana Masonic Home became the successor in interest to Hartzell's servient estate associated with the riparian easements. *Spaw at 239*.

54. It is important to note here that the "successor in interest to Hartzell relinquished any claim to relief based on the plat…" *Spaw at 240*. Therefore, while the Indiana Masonic Home apparently remains the fee owner of the property burdened with the riparian easements, it has denied any interest in the servient estate.

55. As was noted by the Indiana Court of Appeals the actual ownership of the servient estate associated with Indian Trail is not as important as the conclusion that the Petitioners did not acquire title to that real property by adverse possession. *Altevogt*, 963 N.E.2d 1146, 1155.

56. Neither the Petitioners nor any other Lot owner within Long Lake Park are either the owners of the servient estate associated with the riparian easements or the Indian Trail and they are also not fee title owners of any land abutting Big Long Lake.

Relational Impact of the Construction Authorized by PL-21897 Upon the Dominant and Servient Estates Associated with the Riparian Easements:

57. The Indiana Court of Appeals on January 11, 2012, stated:

> It is well established that easements are limited to the purpose for which they are granted. The owner of an easement, known as the dominant estate, possesses all rights necessarily incident to the enjoyment of the easement. The owner of the property over which the easement passes, known as the servient estate, may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use. All rights necessarily incident to the enjoyment of the easement are possessed by the owner of the dominant estate, and it is the duty of the servient owner to permit the dominant owner to enjoy his easement without interference. The servient owner may not so use his land as to obstruct the easement or interfere with the enjoyment thereof by the owner of the dominant estate. Moreover, the owner of the dominant estate cannot subject the servient estate to extra burdens, and more than the holder of the servient estate can materially impair or unreasonably interfere with the use of the easement.

Rehl v. Billetz, 2012 Ind. App. LEXIS 9, *12-13, (2012).

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58. "Appurtenant easements are inseparably united to the land to which they are incident. 'They are in the nature of covenants running with the land.'". *Spaw, supra* at 246, citing *Schwartz v. Castleton Christian Church, Inc.*, 594 N.E.2d 473 (Ind. App. 1992).

59. The Petitioners are correct that "a right-of-way appurtenant to one parcel of land may not be subjected to use by other premises to which the easement is not appurtenant," *Selvia v. Reiteyer, 295 N.E.2d 869, 874, (Ind. App. 1973)* and that the "owner of the dominant estate cannot by any act of his own, independent of the consent of the owner of the servient estate, use the easement or authorize it to be used for the benefit of any lands other than these to which it adheres." *Kixmiller v. Baltimore & O.S.W.R. Co*., 111 N.E.401, 403, (Ind. App. 1916).

60. In *Selvia*, the appellant was the owner of two adjoining parcels of real property, one parcel that under previous ownership had been in unity with the property owned by the appellees and a second parcel that had not. The court established an implied easement of necessity over the appellees' property only with respect to the appellant's property that had previously been in unity with the property of the appellees. The court, acknowledging that "an easement cannot be implied over the land of a stranger" refused to imply an easement for the benefit of appellant's second parcel of property thereby denying the appellant the ability to use the implied easement to reach appellant's second parcel of property. The court reasoned that an easement "appurtenant to one parcel of land may not be subjected to use by other premises to which the easement is not appurtenant." *Selvia* at 874, additional citation omitted.

61. In many of the cases cited by Petitioners the factual situation is the same as *Selvia* with the owner of the dominant estate unilaterally increasing the burden upon the servient estate through application of the easement to additional lands. *Halsrud v. Brodale*, 72 N.W.2d 94, (Iowa 1955), (A drainage easement that by its express terms effected drainage of one section of property could not be used to effect drainage of an additional section of property.), *Penn Bowling Recreation Center v. Hot Shoppes*, 179 F2d. 64, (D.C. Cir. 1950), (The use of an easement was inappropriate for accessing a bowling and recreation center that had been constructed partially upon the dominant estate and partially upon property acquired two years after the easement was obtained.), *McCullough v. The Broad Exchange Co.*, 101 A.D. 566 (N.Y.A.D. 1905), (Easements for the use of an open area and alley for ingress and egress to a specifically identified parcel of property cannot be used by the dominant tenant for the benefit of later acquired properties.).[1]

62. The state of the law remains that a servient estate shall be burdened only with respect to the identified dominant estate.

[1] Dicta from *Kixmiller v. Baltimore and Ohio Southwestern Railroad Co.,* 111 N.E. 401, was cited by petitioners but is not considered in detail here because the dicta related to an issue determined by the trial court that did not require a determination on appeal.

63. It is equally the situation that the holder of an easement may not subject the easement to expanded uses not contemplated by the parties creating the easement. *Kwolek v. Swickard*, 944 N.E.2d 564, (Ind. App. 2011) (the owners of the dominant estate were prohibited from parking within an easement that was granted for the "limited purpose of ingress and egress"), *Drees Co. v. Thompson*, 868 N.E.2d 32, (Ind. App. 2007), (considering the increased use of an easement by the owner of the servient estate who planned to subdivide and develop his property).

64. While specific generally accepted principles of law are involved in determining the intended purpose of easements, those matter are not discussed here because the purpose of the riparian easements at issue herein was previously determined in *Spaw*.

65. Each riparian easement at issue here is for "an unimproved or improved place from which boats may be used to deliver passengers or goods. Specifically prohibited was the placement of a boathouse. Examples of improvements that could be made by a lot owner included the placement of a pier or wharf." *Spaw* at 243.

66. The administrative law judge in *Spaw* observed that "[n]either the claimants nor the respondents[2] advocate adherence to the six-foot wide boat landing easements provided in the plat for each Lot owner." *At 246*. Further discussion regarding changes resulting from the passage of time and societal development occurs within a footnote to the *Spaw* decision as follows:

> The respondents urge in their post-hearing brief that the six-foot wide easements created 'by Lee Hartzell are a buggy whip in a Corvette world—although they may have served a legitimate purpose at one time, they are no longer feasible or workable and, in fact, hinder and impair the very benefit that they purport to provide. Under these circumstances, which are really not in dispute, the Restrictions fail.' … In 1923 when Hartzell provided six-foot easements for boat landings, they were of modest utility. He must have known then that there were many boats which could not be launched from a six-foot easement. The appetite for lake usage has undoubtedly increased since 1923, but appetite is not and cannot be the measure of an easement. Alleys are not expressways, but alleys still have utility."

Spaw at 246, fn5

67. "The proper function of a particular easement should be gleaned by contemplating not the character of the traffic intended to travel the way, but rather the purpose to be served by the traffic." *Brock v. B & M Moster Farms, Inc*., 481 N.E.2d 1106, 1108, (Ind. App. 1985). This philosophy has proved useful to the courts in determining the appropriate construction of an otherwise unambiguous easement "authorizing use of the right-of-way by 'wagons, horses and footpassers'" to be an easement granting general ingress and egress rights. *Id.*, referencing *Jeffers v. Toschlog*, 383 N.E.2d 457, (Ind. App. 1978) in which "an access easement created in 1907 where 'teams and wagons' were authorized to travel the way in

[2] Many of the Petitioners and Applicant Respondents in the instant proceeding were Claimants or Respondents in *Spaw*.

conducting their business" to be an easement "for the purpose of permitting vehicles to pass through the driveway."

68. *Brock* and *Jeffers* reflect the preference of the courts to construe the situation of a "buggy whip in a Corvette world" observed by the Petitioners in *Spaw* with respect to easements containing "latent ambiguity[ies]" created by "the mere passage of time and development of society" instead of the terminating the easement. In fact, the *Brock* court expressly notes that "in case of doubt or uncertainty, the grant of an easement will ordinarily be construed in favor of the grantee." *Brock* at 1108.

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69. That watercraft design has changed since the creation of the riparian easements 1923 is not the question any more than that the primary means of travel has changed since 1911 from "wagons, horses and footpassers" and "teams and wagons" to modern day automobiles. The important question is that the purposes that may be put to the use of watercraft remains the same today as in 1923 just as the purpose of wagons and horses equivocates today's use of automobiles. Thus the purpose of the riparian easements to provide "an unimproved or improved place from which boats may be used to deliver passengers or goods… Examples of improvements that could be made by a lot owner included the placement of a pier or wharf" also remains consistent from 1923 to the present. *Spaw* at 243. Consequently, the intended use of the dominant estate and the burden to be borne by the servient estate remains consistent though through the passage of time there have been developments in watercraft design, as well as mooring facilities for those watercraft that may alter the appearance of the use.

70. PL-21897 at issue clearly authorizes a use consistent with the predetermined purpose of the riparian easements.

71. In the process of accommodating modern usage of easements it remains the case that the "easement cannot be changed to subject the servient estate to a greater burden than was originally agreed upon without the consent of the owner of the servient estate." *Brock* at 1108. In Brock, the holder of the dominant estate was disallowed from paving the right-of-way granted by the easement or from subdividing the dominant estate in such a manner that the easement would be subjected to increased traffic. The court noted that only those improvements and repairs may be made, "which are reasonably necessary to make the grant of the easement effectual." *Brock* at 1109, citing *Litzelswope v. Mitchell*, 451 N.E.2d 366, (Ind. App. 1983).

72. It is not disputed that:

> the [riparian] easements associated with part of Lot 75, Lots 76, 77, 78 and 79 in Block 7 of Long Lake Park are plainly appurtenant, unique to, and solely for the benefit of those specific individual lots, and are <u>not</u> appurtenant to any other lots within Block 7 or any other part of Long Lake Park.

Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 14.

73. With respect to Permit PL-21897, the pier authorized for construction includes a three foot wide walkway extending 110 feet lakeward from its affixed location at the shoreline within a 30 foot expanse of riparian easements created by the combining of five individually owned six-foot riparian easements. Petitioners' Motion for Summary Judgment, Exhibit 5. The three foot walkway will be located near the center of the riparian zone with mooring space for a boat on each side of the walkway at the lakeward end. Five feet on each side, for a total of ten feet of the 30 foot riparian zone, is dedicated as a "safety buffer" leaving space landward of the boat moorings of eight feet in width on one side of the pier and nine feet in width on the other side of the pier that would remain useable by the Applicant Respondents. The Certificate of Approval for PL-21897 reflects that "Special Conditions" exist with respect to PL-21897 but evidence related to these conditions is not in the record for consideration on summary judgment. What is apparent from the evidence on record is that the Applicant Respondents intend to moor boats "at the end of the dock so as not to interfere with a patch of spatterdock located near the shoreline." *Id*. It is unclear, absent consideration of the "Special Conditions", whether the use of PL-21897 was subjected to any restrictions prohibiting any or all use of the space landward of the boat moorings.

74. PL-21897, as issued, authorizes one three foot walkway located on one riparian easement to provide access to a pier serving five Lots. Therefore, the servient estate associated with the one riparian easement located on the shoreline of Big Long Lake where the pier walkway is to be located would, in fact, be burdened beyond what was anticipated by the grantor of the riparian easements.

75. A strict construction of common law applicable to appurtenant easements indicates that through the approval of PL-21897 the Applicant Respondents are authorized "to do that which Indiana common law plainly forbids them to do…", which is to burden one riparian easement with the three foot walkway serving four additional riparian easements. Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 14.

76. To the extent that the construction authorized by PL-21897 impose additional burdens upon one servient estate, or one six foot riparian easement, for the benefit of multiple Lots within Long Lake Park, there appears to be a valid contention, based solely upon a strict application of common law principles relating to appurtenant easements, that one riparian easement is being burdened beyond the expectation of the grantor of the easement.

77. It is interesting to note however, that because the riparian easement and thus the servient estate exists solely upon a two-dimensional, linear stretch of shoreline and no owner of any riparian interests owns any portion of Big Long Lake, the Applicant Respondents may easily overcome the strict application of common law principles associated with appurtenant easements here by simply constructing a walkway running parallel to and lakeward of the shoreline for the full width of the combined riparian easements from which the one walkway extending perpendicularly lakeward will protrude. In this manner, each individual riparian easement would be equally burdened by supporting the walkway running parallel to the shoreline by which each riparian easement would be provided access to the perpendicular walkway providing access to the individual mooring stations. The action that might be taken by the Applicant Respondents to overcome the strict application of common

law through the additional construction of a walkway parallel to the shoreline creates a simply absurd result in this case.

Inapplicability of Common Law With Respect to Easement Conveying Riparian Rights

78. Notwithstanding paragraphs 74 through 76, it is determined that strict application of common law in this instance is countermanded by Indiana Code §§14-26 et seq., commonly referred to as the Lakes Preservation Act, and applicable administrative rules found at 312 IAC 11.

79. In *Bei Bei Shuai v. State of Indiana*, 966 N.E.2d 619, , (Ind. App. 2012), the Indiana Court of Appeals stated:

> We recognize English common law unless our legislature explicitly abrogates it: The law governing this state is declared to be:
>
> Sec. 1. The law governing this state is declared to be:
>
> First. The Constitution of the United States and of this state.
>
> Second. All statutes of the general assembly of the state in force, and not inconsistent with such constitutions.
>
> Third. All statutes of the United States in force, and relating to subjects over which congress has power to legislate for the states, and not inconsistent with the Constitution of the United States.
>
> Fourth. The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth,) and which are of a general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section.

Citing Indiana Code § 1-1-2-1.

80. With respect to Indiana's public freshwater lakes the Indiana General Assembly has enacted legislation that states:

> Sec. 5…
> (c) The:
> (1) natural resources and the natural scenic beauty of Indiana are a public right; and
> (2) **public of Indiana has a vested right in** the following:
> **(A) The preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state.**
> **(B) The use of the public freshwater lakes for recreational purposes.**

(d) **The state:**

(1) has full power and control of all of the public freshwater lakes in Indiana both meandered and unmeandered; and

(2**) holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes**.

(e) **A person owning land bordering a public freshwater lake does not have the exclusive right to the use of the waters of the lake or any part of the lake.** Indiana Code § 14-26-2-5.

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81. Therefore, "[w]ith enactment of the Lakes Preservation Act, the **common law privileges of a riparian owner have been modified by public trust legislation** recognizing the public's right to preserve the natural scenic beauty of our lakes and their recreational values". Indiana Code § 14-26-2-5; *Majewski v. DNR*, 12 CADDNAR 299, 302, (2011). (emphasis added). "Riparian landowners, however, continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must be balanced with the public's rights." *Lake of the Woods v. Ralston*, 748 N.E.2d 396, 401, (Ind. App. 2001).

82. With respect to easements involving riparian rights on waters under the jurisdiction of the Lakes Preservation Act, it is first the Constitution of the United States and of this state followed by the statutes enacted by the general assembly that will control. There being no Constitutional issue raised by any party, the matter of the Department's issuance of the Permits to the Applicant Respondents is appropriately governed by the Lakes Preservation Act and AOPA along with rules adopted at 312 IAC 11-1 through 11-5 for the purpose of implementing the Lakes Preservation Act and 312 IAC 3 for the purpose of implementing AOPA.

83. The rights of riparian landowners and restrictions upon those rights, relating to a public freshwater lake apply equally to "the owner of an interest in land sufficient to establish the same legal standing as the owner of land, bound by a lake." 312 IAC 11-2-19.

84. By virtue of the *Spaw* decision, all the Lot owners within Long Lake Park, including the Applicant Respondents, as holders of the riparian easements, possess an ownership interest in land, a six-foot, two-dimensional linear stretch of shoreline along Big Long Lake, sufficient to establish the same legal standing as the fee owner of that land such that they may seek and be granted PL-21897.

85. Activities occurring lakeward of the shoreline of Big Long Lake in conjunction with PL-21897 is entirely within the governance of the Department in fulfilling its obligation to hold Indiana's public freshwater lakes in trust for the benefit of all citizens of Indiana.

The Petitioners Lack Standing to Initiate a Proceeding Based Upon Improper Burdens Upon the Servient Estate.

86. The Petitioners maintain that the approval of PL-21897 "authorizes the [Applicant Respondents] to do that which Indiana common law plainly forbids them to do, and further

consents and sanctions a continuing trespass upon the Indian Trail, the servient estate from which the boat landing easements emanate." Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 14.

87. The Petitioners are incorrect in their conclusion that the servient estate associated with the riparian easements is the Indian Trail. Instead, as was discussed in Finding 45 the appurtenant riparian easements find their source on the shoreline of Big Long Lake, the point at which the easement in gross to the Indian Trail ceases.

88. The Petitioners proceed to erroneously state that "the LaGrange Circuit Court in Cause No. 44C01-0811-MF-066 ruled that each owner of a lot within Long Lake Park is a co-tenant owner of the Indian Trail. Thus, all of the owners of lots within Long Lake Park are the owners, as co-tenants, of the servient estate related to the boat landing easement within Long Lake Park." *Id.*, at pg. 18. The Petitioners' characterization of the lot owners as co-tenant **owners** of the Indian Trail is a mischaracterization of the LaGrange Circuit Court's decision, which referred to the lot owners only as co-tenants in the Indian Trail, not as co-tenant **owners**. Moreover, the Indiana Court of Appeals clarified the intent of this statement, as set forth in Finding 10, in its decision issued on March 15, 2012, one day before the Petitioners filed their Brief. Neither the Petitioners, nor any lot owner within Long Lake Park, are owners of the land associated with the Indian Trail and consequently they are likewise not the owners of the servient estate associated with the Indian Trail and they also do not possess riparian rights associated with the Indian Trail.

89. The Plat to Long Lake Park grants to each individual Lot owner the dominant estate associated with the riparian easement that corresponds to the Lot owned in a numerical sequence and that ownership is solely and exclusively granted to one individual Lot owner and the rights to the dominant estate associated therewith exists by and between the individual lot owner and the owner of the servient estate, who arguably is the Indiana Masonic Home.

90. To the extent that the Petitioners' challenge to the Department's issuance of PL-21897 to the Applicant Respondents relates to increased burdens placed upon the servient estate, which is not owned by the Petitioners, they are not proper parties to raise the issue.

91. The instant proceeding is governed by Indiana Code § 4-21.5-3-5. A person may seek administrative review under Indiana Code § 4-21.5-3-7(a), which states:

> (a) To qualify for review of a personnel action to which IC 4-15-2 applies, a person must comply with IC 4-15-2-35 or IC 4-15-2-35.5. To qualify for review of any other order described in section 4, 5, or 6 of this chapter, a person must petition for review in a writing that does the following:
>
> (1) States facts demonstrating that:
>
> (A) the petitioner is a person to whom the order is specifically directed;
>
> (B) the petitioner is aggrieved or adversely affected by the order; or
>
> (C) the petitioner is entitled to review under any law.

92. "Essentially, to be 'aggrieved or adversely affected,' a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest." *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 810, (Ind. 2004).

93. The Indiana Masonic Home, the apparent owner of the servient estate associated with the riparian easements, is the only proper person to make such a claim and it has not so acted.

INTERFERENCE WITH PETITIONERS' RIGHTS AS CO-TENANTS IN THE DOMINANT ESTATE ASSOCIATED WITH INDIAN TRAIL

94. While the Petitioners are not owners of the servient estate associated with the riparian easements and are also, as determined previously at Finding 88, not either co-owners of the servient estate associated with the Indian Trail or riparian owners by virtue of their co-tenancy of the dominant estate associated with the Indian Trail, they are co-tenants, along with all other Lot owners in Long Lake Park, of the dominant estate interest in Indian Trail, which lies immediately adjacent to the riparian easements. Pursuant to Indiana Code § 4-21.5-3-7(a) they may pursue administrative review by alleging that they are "aggrieved or adversely affected" by impacts of PL-21897 and the Applicant Respondents' planned construction upon their legal interests in the Indian Trail. *Huffman, supra*.

95. The subject of inquiry here relates to whether the construction authorized by PL-21897 will in any manner impede or interfere with the intended use of Indian Trail by other Lot owners within Long Lake Park who are co-tenants of the dominant estate interest in Indian Trail.

96. Indian Trail "exists between the shoreline or water line of Big Long Lake and the entire lengths of Block 6, Block 7, and Block 8." *Spaw* at 239. Every Lot owner within Long Lake Park is entitled to use Indian Trail.

97. In *Spaw* it was stated that the riparian easements "traversed Indian Trail and extended to the lakeshore of Big Long Lake", *at 241*, however, it is also clear from *Spaw* and *Altevogt*, as the Petitioners' aptly conclude, that "each owner of a lot within the Plat of Long Lake Park owns the Indian Trail as co-tenants, together with all other such owners of lots within Long Lake Park" and that each of the riparian easements "runs consecutively along the shoreline of Big Long Lake …" Petitioners' Motion for Summary Judgment, pg. 3.

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98. The riparian easements, which abut Indian Trail, are located on the shoreline of the Block of Long Lake Park by virtue of the location of the Lot owned. Therefore, the Lot owners within Block 7 may also use Indian Trail to access their individual six-foot riparian easements. The design of the Plat, the granted easement in gross to Indian Trail and the grant of appurtenant easements to each Lot owner within Long Lake Park obligate this conclusion. See *Spaw*.

99. One use to which every individual Lot owner may put the Indian Trail is to traverse it for any reason, which could certainly include for means of accessing their individual riparian

easement. This is not by virtue of the fact that their individual riparian easement extends across a portion of Indian Trail but instead by virtue of the easement in gross that every Lot owner in Long Lake Park maintains in the Indian Trail.

100. Whether the Applicant Respondents use Indian Trail to access multiple individual six-foot riparian easements or to access one pier constructed on a length of lakeshore equaling the combined number of six-foot riparian easements, one use of Indian Trail will remain as a walkway and a means of access to the riparian easements of the Lot owners within Long Lake Park, including the Applicant Respondents. This use was clearly anticipated by the grant contained within the Plat to Long Lake Park. *Spaw* and *Altevogt*.

101. Co-owners of a dominant estate may not interfere with the use of the easement by other co-owners. *Kwolek & Drees*. Therefore, the Applicant Respondents may not do anything upon Indian Trail that interferes with the use of Indian Trail by any other Lot owner within Long Lake Park.

102. The exact shoreline point that forms the lakeward boundary of Indian Trail is the beginning, and essentially the end, of the individual, two-dimensional, linear riparian easements that are owned by each Lot owner within Long Lake Park. The language establishing the riparian easements dictates that the Applicant Respondents, as well as all other Lot owners in Block 7 and Block 8 of Long Lake Park, possess no authority to construct piers or take any other action consistent with their enjoyment of their riparian easements at any point except "on" the shoreline of Big Long Lake. *Spaw* at 238.

103. The Department's "jurisdiction does not extend outside the 'shoreline or water line' (under IC 14-26-2-4)." *Pipp v. Spitler, et al.*, 11 CADDNAR 39, 41 (2007).

104. A review of PL-21897 reveals that the pier authorized for construction "will extend …lakeward of, and perpendicular to, the legal shoreline". Petitioners' Motion for Summary Judgment, Exhibit 5.

105. In keeping with the Department's jurisdictional authority and the limitations of the riparian easements, PL-21897 does not authorize any activity landward of the shoreline of Big Long Lake. Therefore, neither PL-21897 nor the pier construction authorized by PL-21897 encroaches in any way upon the Indian Trail. Consequently, there is absolutely no evidence that either PL-21897 or the authorized pier construction will interfere with the use of the Indian Trail by any co-tenant of that easement, including the Petitioners.

SUBVERSION OF GROUP PIER PERMITTING PROCESS

106. The Petitioners maintain that the Applicant Respondents should have been obligated to obtain a group pier permit under 312 IAC 11-4-8. A group pier is defined at 312 IAC 11-2-11.5 as:

> Sec. 11.5. "Group pier" means a pier that provides docking space for any of the following:
> (1) At least five (5) separate property owners.

(2) At least five (5) rental units.
(3) An association.
(4) A condominium, cooperative, or other form of horizontal property.
(5) A subdivision or an addition.
(6) A conservancy district.
(7) A campground.
(8) A mobile home park.
(9) A club that has, as a purpose, the use of public waters for:
(A) boating;
(B) fishing;
(C) hunting;
(D) trapping; or
(E) similar activities.

107. It is an accurate statement that PL-21897 authorizes the construction of one pier by combining the riparian easements associated with five lots within Long Lake Park. Petitioners' Motion for Summary Judgment, Exhibit 4.

108. The Petitioners reason that the Applicant Respondents' application for PL-21897 should have been considered one for a "'Group Pier' serving an 'association' pursuant to 312 IAC 11-2-11.5(3)." Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 23.

109. The Petitioners maintain that the act, on the part of more than one of the Applicant Respondents, of entering into an agreement to coordinate their lake access, created an "association" of Applicant Respondents which obligated them to obtain a group pier permit under 312 IAC 11-2-11.5(3).

110. As noted by the Petitioners there exists no legal definition of the word "association" in the context of the Lakes Preservation Act and consequently, the plain and ordinary meaning of the word is appropriately applicable.

111. "Association" is defined as "[t]he act of a number of persons in uniting together for some special purpose or business. It is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common objectives…." Black's Law Dictionary, Sixth Edition. West Publishing Co. 1990.

112. The first and foremost rule of statutory construction is that where a statute or administrative rule is unambiguous on its face, any construction of that statute or rule is inappropriate. *F.D. McCrary Operator, Inc. v. DNR*, 10 CADDNAR 75, 79 (2005) citing *Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823, (Ind. App. 1982) and Sloan v. State, 947 N.E.2d 917, (Ind.) 2011).

113. While viewed solely in terms of the definition of "association" and solely in the context of 312 IAC 11-2-11.5(3) it appears as though the Applicant Respondents who applied for and were issued PL-21897 should have been obligated to obtain a group pier permit under 312 IAC 11-4-8. However, such a result is inconsistent with the plain and unambiguous

language of 312 IAC 11-2-11.5(1), which clearly exempts from the group pier definition those piers providing docking space for four or fewer separate property owners. The application of 312 IAC 11-2-11.5(3) espoused by the Petitioners would effectively render 312 IAC 11-2-11.5(1) meaningless.

114. Statutory construction "requires that every word be given effect, and no part be held meaningless. *Union Township School Corporation v. State ex rel. Joyce*, 706 N.E.2d 183, (Ind. App. 1998). Where the plain and customary meaning of the words will defeat the intent of the legislature, the words may be afforded a particular or technical meaning. *Johnson County Farm Bureau Co-Op, Inc. v. Indiana Department of State Revenue*, 568 N.E.2d 578, *affirmed* 585 N.E.2D 1336 (Ind. 1992). Any such statutory construction requires that a determination be made through a consideration of the entire act. Ernst and *Ernst v. Underwriters National Assurance Company*, 381 N.E.2d 897 (Ind. App. 2 Dist. 1978)." *F. D. McCrary, supra*

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115. The only means by which to give effect to both 312 IAC 11-2-11.5(1) and 312 IAC 11-2-11.5(3) is to conclude that the term "association" may relate to owners of separate property interests who have joined together for a common purpose but only if the pier in question will provide docking space for "at least five (5) separate property owners." [3]

116. The Applicant Respondents were not obligated to obtain group pier permits under 312 IAC 11-4-8.

CONSIDERATION OF THE APPLICANT RESPONDENTS' PERMIT APPLICATION UNDER INDIANA CODE § 14-26-2-23

117. Under Indiana Code § 14-26-2-5, it is the Department that "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes." By this legislative grant of authority to the Department, a person owning land bordering a public freshwater lake, including a person, such as the Lot owners to Long Lake Park, who possess a dominant riparian interest in property bordering a public freshwater lake no longer possess an "exclusive right to use the waters of the lake or any part of the lake." Instead, the "state has full power and control of all of the public freshwater lakes in Indiana."

118. The pier proposed and authorized for construction by PL-21897 would, by all appearances, qualify for placement under a general license provided for at Indiana Code § 14-26-2-23(e)(2)(B) and 312 IAC 11-3-1(b) except for the litigation in *Spaw* by which the pier is required to be permitted by the Department in accordance with Indiana Code §§ 14-

[3] The administrative law judge observes that the most likely intended application of 312 IAC 11-2-11.5(3) was to homeowners or property owners associations. However, if that was the intended meaning it would be advisable to offer such a definition for clarification.

26-2 and 312 IAC 11-1 through 312 IAC 11-5. Of particular note is the applicability of Indiana Code § 14-26-2-23(c) and 312 IAC 11-3-3.[4] *Spaw* at 233.

119. Indiana Code § 14-26-2-23(c) states:

> (c) The department may issue a permit after investigating the merits of the application. In determining the merits of the application, the department may consider any factor, including cumulative effects of the proposed activity upon the following:
>
> (1) The shoreline, water line, or bed of the public freshwater lake.
>
> (2) The fish, wildlife, or botanical resources.
>
> (3) The public rights described in section 5 of this chapter.
>
> (4) The management of watercraft operations under IC 14-15.
>
> (5) The interests of a landowner having property rights abutting the public freshwater lake or rights to access the public freshwater lake.

120. PL-21897 was issued to the Applicant Respondents based upon the grant of riparian rights contained within the plat of Long Lake Park as determined in *Spaw.* 312 IAC 11-2-19*, Spaw* at 241.

121. The riparian rights of the Lot owners within Long Lake Park correlate to their Lot ownership. In this instance, PL-21897 involves the riparian easement correlating to Lot number 75, the ownership of which appears to be in partial dispute. Applicant Respondents, Gary and Nadene Ward, identify themselves as the owners of Lot number 75, while Petitioners, Carl Ray Mosser and Margaret M. Mosser, also claim to own "0.02 acres, more or less" of property formed by a "part of Lot 75 and part of the vacated walkway easement adjacent to Lot 75…" Petitioners' Motion for Summary Judgment, Exhibits 4 and 14.

122. Based upon this evidence, it appears uncertain whether the riparian zone for which the Department issued PL-21897 is an appropriate riparian zone.

123. The remaining issues raised by the Petitioners with respect to the Department's approval of PL-21897 relate to "safety risks" and "navigability", which is addressed under Indiana Code § 14-26-2-23 pertaining to "the management of watercraft operations…", and the interference with the Petitioners' property rights, which would be addressed under the authority of Indiana Code § 14-26-2-23(c)(5), "interests of a landowner having property rights abutting the public freshwater lake".

124. With respect to these issues it is observed that the Petitioners refer to the "safe and reasonable exercise" of riparian rights by Alan Macklin and Daniel Rondot, who are not

[4] The Petitioners state that "…regulations of the Indiana Department of Natural Resources implementing this statutory mandate" are found at 312 IAC 6-4-5, which is incorrect. The administrative law judge notes that 312 IAC 6-4-5 is applicable to the "placement and maintenance of a pier is authorized *without a written license* issued by the department under *IC 14-29-1*. The inapplicability of 312 IAC 6-4-5 is evident immediately by the fact that at issue here is the issuance of a written license; not the construction of a pier without a written license. Furthermore, the licenses sought and obtained by the Applicant Respondents are under the jurisdiction of Indiana Code §§ 14-26-1 et seq., not Indiana Code §§ 14-29-1 et seq.

parties to the instant proceeding. The Petitioners' may not maintain the present action on behalf of non-parties. The only matters to be determined in the instant proceeding are issues between the Petitioners and the Respondents and the riparian interests of Alan Macklin and Daniel Rondot will not be further considered. *Rademaker v. Wells*, 12 CADDNAR 224, 231, (2010).

Discussion of PL-21897

125. The pier to be constructed under the authority of PL-21897 will "extend 110 feet lakeward of, and perpendicular to, the legal shoreline of the lake" and will be three feet in width. Petitioners' Motion for Summary Judgment, Exhibit 5. A revised diagram of the pier dated December 16, 2011 depicts available mooring space of 8 feet in width on the south side and 9 feet in width on the north side of the pier with boat mooring at the lakeward end of the pier on both sides. The revised diagram indicates that "boats will be moored at the end of the dock and may not to interfere with a patch of spatterdock located near the shoreline". *Id*.

126. The revised diagram reflects the pier's placement lakeward of the Riparian Easements associated with Lots 75 through 79 in Block 7, which constitute 30 feet of shoreline and indicates the inclusion of a "5 ft. safety buffer" on both sides of the riparian zone. *Id*.

127. Riparian zones associated with other Lot owners' Riparian Easements exist on both the north and south side of the riparian zone associated with PL-21897.

Navigation and Safety Concerns Associated with PL-21897

128. The Commission has established "Riparian Zones within Public Freshwater Lakes and Navigable Waters," Information Bulletin #56 (Second Amendment), Legislative Services Agency, 20100331-IR-312100175NRA (March 31, 2010) (hereinafter referred to as IB #56) "to provide guidance for determining the boundaries of riparian zones within public freshwater lakes and within navigable waters. The guidance helps define the relationships between neighboring riparian owners, between easement holders and the fee ownership, and between riparian owners and public use of the waters." *At* pg. 2.

129. As previously stated, the riparian zones associated with PL-21897 were established in *Spaw*; however IB #56 is important to the evaluation of PL-21897 with respect to the existence of open water areas between piers, commonly referred to as "setbacks" or "buffer zones" that provide navigation lanes.

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130. IB #56 specifies that "[t]o assist with safe navigation, as well as to preserve the public trust and the rights of neighboring riparian owners, there ideally should be 10 feet of clearance on both sides (for a total of 20 feet) of the dividing line between riparian zones. At a minimum, a total of 10 feet is typically required that is clear of piers and moored boats…" *Id.* at pg 2.

131. The guidance provided by IB #56 is consistent with a long line of precedent by which the Commission has required riparian owners to maintain buffer zones between piers, moored watercraft or other structures placed within a public freshwater lake. See generally *Havel & Stickelmeyer v. Fisher,* 11 CADDNAR 110, (2007); *Rufenbarger, et al. v. Blue, et al.*, 11 CADDNAR 185, (2007); *Roberts v. Beachview Properties, LLC, et al.*, 9 CADDNAR 163, (2004).

132. For purposes of the foregoing discussion it is important to highlight here, the fact that the riparian easements associated with Block 7 begin at the northern most point, or the southern boundary of Shawnee Drive, and continue by consecutive numbering in a southerly direction. *Spaw, supra,* Petitioners' Motion for Summary Judgment, Exhibit 1. Again, the riparian easements do no extend across the entire shoreline of Big Long Lake associated with Block 7. *Spaw, supra*.

133. It is equally important to emphasize here that the purpose of IB #56's specification of setbacks or buffer zones is to address "interference with the rights of the public or with the rights of other riparian owners. 'These rights can co-exist only if the riparian right to build a pier is limited by the rights of the public and of other riparian owners'". IB #56 at pg. 2, citing *Bath v. Courts,* 459 N.E.2d 72, 76, (Ind. App. 1984).

134. Because there exists a Riparian Easement on both sides of the PL-21897 riparian zone, IB #56 requires that a minimum five foot setback exist on both sides of the PL-21897 riparian zone.

135. PL-21897 complies with IB #56 in this regard.

136. It is accurate that the five foot setbacks prescribed by PL-21897 do not meet the "ideally" imposed setback of "10 feet of clearance on both sides" but the setbacks imposed upon PL-21897 are, nonetheless, in compliance with the guidance of IB #56.

137. Notwithstanding the determination that compliance with IB #56 has been achieved, it is acknowledged that IB #56 does not have the effect of law and the setbacks prescribed therein are merely guidance. In this context, the setbacks imposed in a particular situation can be less than the "ideal" 10 feet per side of a riparian boundary, as is the situation here. Arguably, then the required setback could feasibly be less than the "minimum" setback of five feet per side of the riparian boundary or even, as the Petitioners' observe, more than the "ideal" 10 feet per side.

138. The ever important determination is not compliance with IB #56; the importance here is with Indiana Code § 14-26-2-23(c)(4 & 5) and the determination that the pier construction is consistent with watercraft operations as set forth at Indiana Code §§ 14-15 and with public interests and private property rights associated with Big Long Lake within the confines of the facts and circumstances presenting in this proceeding.

139. The Petitioners offered the expert testimony of Brian C. Grieser ("Grieser")[5].

140. Grieser offered the opinion that it was "not reasonable" for the Department to determine that the pier authorized by PL-21897 was safe without considering the pier's relationship to other piers and the number and type of boats contemplated for the pier. Grieser's affidavit explains that he reviewed PL-21897 and IB #56 but identifies no other documents that were reviewed and fails to explain how he arrived at the conclusion that the Department did, in fact, fail to make these considerations. Furthermore, Grieser states that the minimum setbacks established by IB #56 are "generally suitable to assure navigational safety around pier structures" but expresses that they are inadequate in this situation "given the expected high numbers and types of watercraft navigating in and around Block 7, together with the proximity of the associated riparian zone to the riparian zones of adjacent property owners within Block 7." The proximity of one riparian zone to another is generally apparent but Grieser does not elaborate upon how he arrived at a determination of the "expected high number" or the type of boats that will be navigating in the area of the pier associated with PL-21897. Grieser notes that there is no "restriction being provided in the permit as to the number, type, or size or watercraft" that may utilize the pier associated with PL-21897 and this statement may be accurate. However, it is observed that the Certificate of Approval associated with PL-21897 reflects that "special conditions" were imposed upon PL-21897 but those special conditions are not included in the Petitioners' designated evidentiary material. Petitioners' Motion for Summary Judgment, Exhibit 5. Grieser offers the conclusory opinion that the pier authorized by PL-21897 will "significantly infringe upon, and will prohibit, the owners of Lots 74 and 80[6], whose riparian zones are located immediately adjacent to the subject riparian zone" from constructing a useable pier or exercising their riparian rights but fails to elaborate upon how he arrived at this conclusion.

141. Grieser's conclusions may be entirely accurate. However, without additional detail explaining the facts upon which those conclusions are based, there is insufficient evidence upon which to accept those conclusions

[5] In previous proceedings under Administrative Cause Nos. 11-160W, 11-161W and 11-162W, Grieser's qualifications as an "expert" were objected to and thereafter Grieser's opinion testimony was accepted only as the opinion of a "skilled witness" in accordance with Indiana Rules of Evidence, Rule 701. The parties to the instant proceeding have offered no objection to Grieser's qualifications as an expert.

[6] The owner of Lot 80, who would be the possessor of the riparian easement and zone associated with that Lot is not a party to the instant proceeding.